PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

February 24, 2003 Agenda ID #1790

Item 8

TO: PARTIES OF RECORD IN RULEMAKING 01-10-024

This is the draft decision of Administrative Law Judge (ALJ) Halligan. It will not appear on the Commission's agenda for at least two days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

The draft decision of ALJ Halligan is being mailed for comment under the provisions of Rule 77.7(f)(9) of the Commission's Rules of Practice and Procedure. The Commission may reduce or waive comments on draft decisions in situations required by public necessity. For those purposes, "public necessity" refers to circumstances in which the public interest in having the Commission consider a decision outweigh the public interest in having the full 30-day comment-and-review period. It is in the public interest to consider the DWR biomass contracts before these contracts expire. Therefore, the Commission will reduce the comment-and-review period. Pursuant to Rule 77.7(f)(9), comments on the draft decision must be served by electronic mail by 10:00 a.m. on February 26, 2003. Parties must file comments with the Commission's Docket Office by 5:00 p.m. on February 26. No reply comments will be accepted.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at http://www.cpuc.ca.gov. In addition to service by mail, parties should send comments in electronic form to those appearances and the state service list that provided an electronic mail address to the Commission, including ALJ Julie Halligan at jmh@cpuc.ca.gov. Finally, comments must be served separately on the Assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious methods of service.

/s/ ANGELA K. MINKIN
Angela K. Minkin, Chief
Administrative Law Judge

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Attachment

Decision **DRAFT DECISION OF ALJ HALLIGAN (Mailed 2/24/2003)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish Policies and Cost Recovery Mechanism For Generation Procurement and Renewable Resource Development.	Rulemaking 01-10-024 (Filed October 25, 2001)

INTERIM OPINION ADDRESSING PETITION FOR MODIFICATION OF DECISION 02-09-053 BY THE DEPARTMENT OF WATER RESOURCES

Summary

In Decision (D.) 02-09-053, the Commission allocated the California Department of Water Resources' (DWR) long-term power purchase contracts between Pacific Gas and Electric Company (PG&E), San Diego Gas and Electric Company (SDG&E), and Southern California Edison Company (SCE), collectively referred to as the "utilities." As explained in that decision, the allocation of DWR contracts was a necessary step towards achieving the Commission's and the Legislature's goal of returning the utilities to the procurement function by January 1, 2003.

On January 7, 2003, DWR submitted a memorandum requesting that the Commission consider modifying D.02-09-053 for the purpose of allocating four additional power purchase agreements between DWR and Madera Power, LLC, Dinuba Energy, Sierra Pacific Industries (Sonora), and Sierra Power Corp. (Terra Bella) to one or more of the utilities.

We have reviewed DWR's request and the parties' comments and deny DWR's request to modify D.02-09-053. As discussed below, adopting DWR's request to allocate four additional contracts to one or more utilities is inconsistent with D.02-08-071 and D.02-12-074 and would result in bypassing the renewable resource solicitation processes recently approved by the Commission. We also find that allocating additional DWR contracts to the utilities would unnecessarily increase DWR's costs and involvement in procurement at a time when the Commission and the Legislature have stated that the utilities should bear full responsibility for these activities.

DWR's Request

According to DWR's January 7, 2003, memorandum, DWR entered into contracts with Madera, Dinuba, Sonora, and Terra Bella for the purchase of unit contingent energy on December 7, 2001. The agreements were extended on March 29, 2002, and June 26, 2002. On December 31, 2002, DWR extended the agreements until June 20, 2003, "to enable the facilities to seek long-term agreements with an IOU subject to CPUC approval."[1] The agreements provide for automatic termination if the Commission does not allocate the agreements to one of the utilities before February 27, 2003.[2]

DWR identifies the potential benefits of allocating the four biomass agreements as follows: (1) The extension of these four agreements provides 48 megawatts (MW) of additional capacity and energy; (2) the allocation would

[1] DWR Memorandum Section I., Page 1.

[2] DWR submitted a Memorandum on January 31, 2003, informing the Commission that DWR and the relevant contracting parties had amended the power purchase agreements extending the expiration date from January 31, 2003, to February 27, 2003.

provide support for renewables through the continued generation of 48 MW from renewable sources; (3) the biomass facilities are important to the local economies in which each is situated; and (4) the allocation provides a net positive cash flow for DWR because the contract price is less than the remittance rate.

DWR also identified the following potential concerns associated with allocating these agreements to one or more utilities: (1) The facilities were offered to the utilities during the recent interim procurement process, but were not selected; (2) The utilities will be in a long position during some hours over the next four to five months and will need to sell surplus energy; (3) The costs associated with these contracts are not included in DWR's 2003 Revenue Requirement.

Positions of the Parties

Comments on DWR's request were filed on January 27, 2003, by SCE, SDG&E and the California Biomass Energy Alliance (CBEA). DWR filed reply comments on January 31, 2003. The utilities oppose adopting DWR's request to allocate the four additional biomass contracts. CBEA supports DWR's request.

SCE objects to the proposed allocation. SCE argues that DWR's petition does not explain why it is appropriate for the utilities to assume the obligations of these contracts. SCE points out that the utilities have already considered proposals from these same facilities as part of the interim procurement solicitation for renewable resources and that these proposals were not found to be competitive relative to other proposals. SCE believes that requiring the utilities to accept an allocation of these contracts would unfairly provide these parties with a "second bite at the apple."

Furthermore, SCE argues that one of the purported benefits of the allocation cited by DWR, the "support for renewables," is misleading because

allocation of the Sierra Power contract would actually undermine the Commission's renewable procurement initiatives by allowing certain parties to bypass the utilities' approved solicitation processes, despite the fact that the contract price of the facilities in question is significantly higher than the Commission's "all-in" benchmark price for renewable procurement. SCE also questions why the utilities should be required to pay 60% more than DWR's contract rate for the same energy.

SCE argues that the contracts cannot be lawfully allocated to the utilities because they expire on January 31, 2003, and that the Commission cannot act before that date because none of the circumstances which justify a waiver or reduction of the 30-day public review and comment period are applicable to the current situation.

SDG&E expresses concern regarding ongoing and piecemeal proposals to modify the allocations that were adopted in D.02-09-053. SDG&E assumes that the Commission will allocate these contracts to the utilities, but states that it does not require additional supply and any additional contract allocations would exacerbate an existing excess supply situation. SDG&E also claims that DWR's analysis of the benefits of allocating the contracts to the utilities is flawed. For example, although SDG&E is sympathetic to the economic impacts of the biomass facilities on the local economies in which each facility is located, SDG&E does not believe that ratepayer funds should be used to subsidize and sustain energy business interests that might otherwise fail. SDG&E notes that DWR's assertion that "the contract price is less than the Commission's remittance rate for energy delivered to retail end-use customers" is confusing and ignores the key fact that these contracts exceed by considerable measure the market price benchmark that was established by the Commission for interim renewables

procurement. SDG&E points out that none of the facilities responded to SDG&E's Request for Offers, but that SDG&E would not have procured the power at $65/MWh. SDG&E suggests that the Commission consider the effect of providing special treatment for these four renewable suppliers who were unsuccessful in securing a contract with the utility through the Commission's adopted approach.

SDG&E suggests that, if the Commission intends to allocate these contracts to the utilities, it should only do so under four conditions: (1) the price should not exceed $53/MWh and any amount in excess of $53 should be provided by the California Energy Commission (CEC); (2) the energy should contribute to the utility's 1% renewables requirement; (3) the energy should be banked for future Renewable Portfolio Standard compliance; and (4) if transmission is constrained and the utility must resell the energy, the utility should still receive credit for the contribution of energy toward its RPS requirement.

CBEA argues that the failure of these facilities to receive contracts from the utilities is the result of noncompliance by the utilities with the 1% renewables requirement adopted in D.02-08-071. For example, CBEA argues that much of PG&E's renewable procurement will not be certified as incremental by the CEC and that the Commission will need to order PG&E to conduct another renewables solicitation to make up the difference. With respect to SCE, CBEA notes that the Commission has held that SCE is not in compliance with the interim renewables requirement, and that SCE's two advice letters on renewables procurement have been protested and their approval is in doubt. CBEA also argues that PG&E and SCE have failed to provide the appropriate data on its renewables procurement requirement.

CBEA argues that, as a result of the utilities' noncompliance, a number of existing renewables facilities, including the four biomass facilities that are the subject of DWR's petition, were left without contracts. CBEA claims that if the Commission does not grant this petition, the contracts will be automatically terminated, and in some cases, the facilities would be forced to close permanently. CBEA notes that D.02-12-074 recommended that biomass facilities without contracts explore a number of options to keep running, including a "potential short-term contract extension through DWR." CBEA claims that the allocation of these contracts to the utilities is necessary to ensure their survival until the utilities can be brought into compliance with the one percent renewables requirement.

Discussion

The Commission's Rules of Practice and Procedures provide all interested parties (and participating state agencies, such as DWR) the opportunity to petition the Commission to makes changes to an issued decision.[3] In this case, DWR has requested that the Commission consider modifying D.02-09-053 to allocate an additional four contracts to one or more utilities. For the Commission's consideration, DWR presented a brief listing of several potential benefits associated with its request, as well as several potential concerns. We have carefully reviewed DWR's request and the parties positions and find that, although the potential benefits cited by DWR are somewhat compelling, they are offset by more compelling concerns.

[3] Rules of Practice and Procedure, Rule 47.

The primary potential benefit cited by DWR is the fact that these contracts would provide an additional 48 MW of capacity and energy to California's supply portfolio. As DWR's admits, however, the additional 48 megawatts is not necessarily a benefit, since the utilities will be in a long position for many hours over the next several months, and will be forced to sell surplus energy. We are concerned about the cost impact that an allocation of unneeded additional capacity would have on the utilities' ratepayers. Especially in this case, where the price exceeds both the market price for energy and the benchmark price set by the Commission for renewable resources, not to mention the fact that the administrative costs associated with these contracts would necessarily include both the utilities' and DWR's administrative costs. In addition, as SCE points out in its comments, the contract price the utilities would be responsible for if these contracts are allocated significantly exceeds DWR's contract price and DWR does not provide any explanation or justification for the difference in price.

Likewise, with respect to the second benefit cited by DWR, no persuasive argument is provided. DWR simply states that allocation of these contracts to one or more utilities would provide additional support for renewables through the continued generation of 48 MW from renewable resources. Nonetheless, as the utilities point out in their comments, the Commission's approved method of supporting and procuring renewable resources is through the one percent set-aside requirement and competitive solicitation process adopted in D.02-08-071. They argue that granting contracts to these four facilities outside of the adopted process would be inconsistent with prior Commission decisions and would undermine the Commission's goals by encouraging other unsuccessful bidders to seek similar relief, if not through DWR contract extensions (since DWR's authority to contract has expired), then through requests to the Commission.

Finally, despite CBEA's claim that the failure of these facilities to receive contracts is the result of noncompliance by the utilities with the Commission's one percent interim renewables requirement, the Commission has found, in Resolutions E-3803, E-3805, and E-3809, addressing the Advice Letter filings by PG&E, SCE, and SDG&E, respectively, that the utilities made a sufficient showing that their bid solicitation processes were competitive and the evaluation methodologies were reasonable consistent with the direction provided in D.02-08-071.[4] In Resolutions E-3803, E-3805, and E-3809, the Commission also found that the utilities have met the 1% renewables requirement. We note, however, that if the power from these resources is not certified as "incremental" as CBEA claims, then the utilities will need to acquire additional resources to make up for the amount of renewable energy it is missing as part of its one percent requirement.[5]

Furthermore, the stated intent of DWR's contract extensions; to "enable the facilities to survive until they negotiate contracts with the utilities" presumes that additional contracts are forthcoming. It is possible that this Commission may find that one or more utilities may need to conduct additional renewable solicitations if the CEC does not deem PG&E's resources as "incremental" or if SCE's or SDG&E's contract resources do not materialize, however, this is by no means assured. Moreover, even if the Commission determines that additional renewable resources are indeed required, these resources should be acquired

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[4] Resolution E-3805 was approved by the Commission on January 30, 2003 and Resolution E-3809 was approved on February 13, 2003, after comments were filed on DWR's request.

[5] Commission Resolution E-3805, Page 13.

through a competitive solicitation, consistent with D.02-08-071 and not through petitions to modify prior Commission orders. We should not unilaterally alter the results of the utilities' renewable procurement processes on the basis of DWR's request. Nor should we prejudge the outcome of the CEC's certification process.

Finally, we are concerned that allocating four additional contracts to the utilities would increase DWR's activities and administrative costs related to procurement at a time when the Legislature and the Commission have both declared that the DWR should be reducing it's activities in this regard. The Commission has taken several steps to return the utilities to full responsibility for procurement including adopting an interim procurement program to allow the utilities to procure resources as of January 1, 2003, allocating existing DWR contracts to the utilities, and approving the utilities short-term procurement plans. DWR has worked diligently along with the Commission to accomplish this goal. Consistent with this goal, DWR's January 7, 2003 request demonstrates that if the Commission decides not to allocate these contracts to one or more utilities, the contracts would expire before June 20, rather than put DWR in the position of continuing to administer the contracts.

We find that allocating these contracts to the utilities would be inconsistent with prior Commission orders, would bypass the approved procurement processes and would be contrary to our goal of returning full responsibility for procurement back to the utilities. For these reasons, we deny DWR's request.

Reduction of Comment Period

Pursuant to Rule 77.7(f)(9) of the Commission's Rules of Practice and Procedure, we determine that the public necessity requires a waiver of the 30-day period for public review and comment. DWR filed its request in this

matter on January 7, 2003, and updated its submittal on January 12, 2003. In response to the January 12, 2003, ALJ Ruling, comments on the request were filed on January 27, 2003 and DWR filed a reply on January 31, 2003. DWR's reply indicated that the expiration date of the contracts under consideration had been extended from January 31, 2003 to February 27, 2003.

We have balanced the public interest in avoiding the possible harm to the public welfare flowing from delay in considering this decision against the public interest in having the full 30-day comment period, and have concluded that the former outweighs the latter and a significantly reduced comment period is in the public interest. Public necessity requires a reduction of the 30-day period for public review and comment because failure to adopt a final decision by the Commission's February 27, 2003 would require DWR to continue administering the contracts contrary to the intent of the Commission and the Legislature under AB1X. Thus, the 30-day comment period is reduced to two days due to public necessity.

Assignment of Proceeding

Loretta M. Lynch is the assigned Commissioner and Julie Halligan is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. On January 7, 2003, DWR submitted a Memorandum requesting that the Commission "consider" modifying D.02-09-053 for the purpose of allocating four additional power purchase contracts to one or more investor-owned utilities.

2. DWR's proposed allocation of four additional biomass contracts would exacerbate the utilities' current position of excess resources.

3. DWR's proposed allocation of four additional biomass contracts would exacerbate the utilities' current position of excess resources.

4. DWR's proposed allocation is inconsistent with the Commission's findings in Resolutions E-3803, E-3805, and E-3809.

Conclusions of Law

1. DWR's proposed allocation would result in granting unfair preference to certain resources outside of the IOU's renewable procurement processes, to the detriment of other resources, and the Commission's approved renewables procurement process, and it should be denied.

2. Pursuant to Rule 77.7(f)(9), we find that public necessity requires a reduction in the 30-day period for public review and comment on this decision because failure of the Commission to act by February 27, 2003 could endanger the public's health and welfare, and this clearly outweighs the public interest in allowing the full 30-day public comment period.

INTERIM ORDER

IT IS ORDERED that the request to modify Decision 02-09-053 submitted by the Department of Water Resources on January 17, 2003 is denied.

This order is effective today.

Dated _____, at San Francisco, California.